No. 310

In the Supreme Court of the United States

October Term, 1957

ALABAMA MILLS, INC., ET AL., PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals, which simply affirmed *per curiam* its earlier opinion on the prior appeal of this case, is reported at 244 F.2d 21 (Pet. App. 1a). Its opinion on the prior appeal is reported at 229 F.2d 506, certiorari denied, 350 U.S. 1002, rehearing denied, 351 U.S. 934. The judgment of the District Court, entered without opinion upon remand after denial of certiorari, is also not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1957. The petition for a writ of certiorari was filed on July 24, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the present petition is not untimely and otherwise inappropriate in view of this Court's previous denial of both a writ of certiorari and a rehearing on the prior petitions filed by these same petitioners for review of the same questions and of the same decision of the Court of Appeals.

2. If the petition is timely and otherwise procedurally appropriate, whether a writ should now be granted to review the reaffirmance by the court below of its earlier decision upholding the statutory authority of the Secretary of Labor to determine a single industry-wide prevailing minimum wage under the wage determination provisions of the Public Contracts Act, in accordance with the consistent and long-standing administrative practice which Congress has accepted throughout the years since the enactment of the Act in 1936.

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act of 1936, 49 Stat. 2036, *et seq.* (41 U.S.C. 35, *et seq.*), as amended by the Fulbright Amendment of June 30, 1952, 66 Stat. 308 (41 U.S.C. 43a), are printed in the petition for a writ of certiorari (Pet. 4-6).

STATEMENT

The questions presented by the petition are identical to those presented by petitioners in their prior petition for a writ of certiorari, filed on February 11, 1956, which was denied March 26, 1956; petition for rehearing denied May 14, 1956 (*Covington Mills, Alabama Mills, Inc., et al.* v. *Mitchell*, 350 U.S. 1002; 351 U.S. 934). The present petition challenges the same decision of the Court of Appeals which the previous petition sought to have reviewed, and all of the petitioners here joined in that previous petition. There have been no changes in either the facts or the law relating to those questions since this Court's previous denial of the writ. For the significant facts bearing on the questions here again presented, we respectfully refer the Court to the Brief for Respondent Secretary of Labor in Opposition to the Petition filed in *Covington Mills, Alabama Mills, Inc., et al.* v. *Mitchell*, No. 682, October Term 1955.

Nothing has been added to the case since the previous denial of certiorari except the entry of judgment by the District Court, upon remand, in accordance with the explicit directions of the Court of Appeals. The directions were that "judgment should be entered for the defendant" against all plaintiffs "who are not dismissed." While the District Court was also instructed "to rule on the motion to dismiss, unless the government withdraws it or the plaintiffs concerned consent to it," this contingency was removed by the withdrawal of the motion to dismiss without objection, thus leaving the direction for entry

of judgment for the defendant unequivocal and final with respect to all of the remaining plaintiffs.

Accordingly, the District Court's judgment simply vacated its prior judgment, dismissed the complaint, and entered summary judgment for the defendants, retaining jurisdiction "for such other and further proceedings as may be proper." At the insistence of petitioners themselves, the judgment included no disposition of the questions of liability on petitioners' bonds, or otherwise, for underpayments of wages during the period the Secretary of Labor had been enjoined from enforcing his wage determination. Admittedly, therefore, nothing more was added to the record which had been before the Court of Appeals and before this Court on the previous appeal and the previous petition for certiorari.

Petitioners nevertheless filed an appeal from the District Court's judgment. Shortly after the docketing of this second appeal, the Secretary of Labor moved (on November 8, 1956) for disposition of the appeal without formal briefs or arguments, on the grounds that the Court of Appeals already had fully heard and decided the subject matter, and that the only purpose or effect of the second appeal was to obtain a rehearing of the issues previously adjudicated. Petitioners opposed this motion, and the court denied it. In addition, petitioners filed countermotions for postponement of the appeal and for hearing by the court *en banc*. Although these motions were ultimately denied, they resulted in delaying disposition of the appeal until April 26, 1957, when the Court of Appeals, by *per curiam* opinion, simply

reaffirmed its decision on the prior appeal (Pet. App. 1a).

Since the present petition for a writ of certiorari was not filed until July 24, 1957 (*i.e.*, after the adjournment of the 1956 term of this Court), well over a year has now already elapsed since the denial of petitioners' previous petition for certiorari. Thus, this litigation over the basic issue of the Secretary's statutory authority has now extended to more than 4½ years. Meanwhile, petitioners have not paid their employees an estimated total of over $400,000 which, but for this litigation, would have been due under the wage determination which by its terms became effective February 21, 1953. (see Pet. 21).

ARGUMENT

Petitioners' present application for a writ of certiorari, is, in effect, no more than another petition for rehearing of this Court's previous denial of the writ and also of rehearing, and therefore should be denied as out of time and inconsistent with Rule 58(2) and (4) of this Court. But even if the present petition is not untimely, the reasons and considerations for denying the previous petition, filed by these same petitioners in this same case, apply with even greater force to the present petition.

1. As is evident from the proceedings and disposition of the second appeal of this case, the second appeal brought up nothing but the same questions fully heard and adjudicated on the first appeal, and was no more than an effort to relitigate those same issues.

Admittedly, there have been no intervening changes in either the facts or the law relating to the issues previously adjudicated.

Petitioners' sole justification for the present reapplication is the purely speculative assumption that the only reason for this Court's previous denial of certiorari was a supposed "lack of finality" in the status of the case with respect to some of the petitioners—those against whom a motion to dismiss for lack of standing to sue was pending. This tenuous speculation, which has already served as an excuse for the prolonged relitigation attempted on the second appeal, ignores the fact that this Court also denied the petition *for rehearing* which had specifically called attention to the finality of the judgment as to the 14 petitioners against whom no such jurisdictional objection was pending, and, in addition, denied the petition for certiorari in the *Allendale* case (*The Allendale Co. et al.* v. *James P. Mitchell*, 351 U.S. 909), which presented the identical questions of statutory construction in the absence of any jurisdictional issue with respect to *any* of the petitioners.

Petitioners do not deny that the judgment which was the subject of the previous petition had finality with respect to those plaintiffs against whom no motion to dismiss for lack of standing to sue was pending at that time. Thus, undeniably, at least some of the present petitioners are now seeking nothing more than a rehearing of the previous denial. We submit that *all* of the petitioners are in this same position, since the prior judgment, for all practical purposes, was equally final, albeit on alternative grounds, as to

all of them. The prior adjudication was unmistakably the final "law of the case" as to all on the sole question presented by the prior and the present petitions, *i.e.*, the statutory authority of the Secretary of Labor to determine an industry-wide prevailing minimum wage for the textile industry. Petitioners themselves recognized this at the time of their previous petition, and neither the Secretary of Labor nor the intervenors, in opposing that petition, claimed any lack of finality as to any of the petitioners.

The present petition plainly does not meet the requirements respecting time or other conditions prescribed for petitions for rehearing in Rule 58(2) and (4) of this Court. No intervening decision of this Court or of any other court, nor any new legislative action, has created a conflict warranting review. On the contrary, the decision of the Court of Appeals which petitioners previously sought to have reviewed has not only now been reaffirmed by that Court, but has been consistently followed by the district courts in litigation involving other wage determinations. *Allendale Co. et al.* v. *Mitchell*, decided February 7, 1956, not officially reported, but printed in 12 WH Cases 760, certiorari denied, 351 U.S. 909; *Ruth Elkhorn Coals* v. *Mitchell* and *Central Pennsylvania Open-Pit Mining Ass'n.* v. *Mitchell*, Civ. Nos. 5052-55 and 4962-55, decided May 23, 1956, not officially reported; *Consolidated Electric Lamp Co. et al.* v. *Mitchell*, Civ. No. 4143-56, decided June 3, 1957, not officially reported, but printed in 32 Labor Cases (CCH), Par. 70, 747.

2. Even if the petition were otherwise timely and appropriate, the reasons and considerations advanced

in opposition to the previous petition apply, *a fortiori*, to the present one. This Court has already three times denied petitions for review of the identical question of statutory construction presented by this petition (having denied both the petitions for a writ and for rehearing filed by the present petitioners in No. 682, October Term 1955, *Covington Mills, Alabama Mills, Inc., et al.* v. *James P. Mitchell*, 350 U.S. 1002; 351 U.S. 934; as well as the petition for a writ in No. 755, October Term 1955, *The Allendale Co. et al.* v. *James P. Mitchell*, 351 U.S. 909).

The present petition brings forward no reasons in support of certiorari other than those fully presented on the previous petitions filed by these same petitioners in *Covington Mills, Alabama Mills* and on the petition in *Allendale*. We respectfully refer the Court to the briefs for the Secretary of Labor in opposition to those petitions (particularly the Brief in Opposition in No. 682, October Term 1955, in *Covington*) instead of repeating the considerations there detailed. All factors and considerations pertinent to the question of statutory construction presented by the instant petition were fairly and adequately presented by the records submitted with those petitions.

The adherence by the Court of Appeals to its prior adjudication was clearly dictated by the considerations of "orderly judicial action," which forbid "the relitigation of matters or issues previously determined on a former review," "except in unusual circumstances" (*Insurance Group Committee* v. *D. & R. G. W. R. Co.*, 329 U.S. 607, 612), and require that litigants not be permitted "by repeated appeals" to

"speculate on chances for changes" in the membership of the court (see *United States* v. *Carmen*, 184 U.S. 372, 374). These same considerations of "orderly judicial action" are implicit in the rules of this Court on petitions for rehearing (Rule 58), and, in the circumstances of this unduly prolonged litigation, call for denial of the present petition.

Not only are there no "unusual circumstances" which now would warrant granting the writ which was previously denied, but the intervening circumstances have only further corroborated the grounds for denial. The Government opposed the previous petitions for certiorari on the grounds that, although the question involved was unquestionably one of national importance, the decision of the Court of Appeals upholding the long-standing administrative practice under the Public Contracts Act was so clearly correct that review was neither necessary nor advisable, as important public interests required the most expeditious possible termination of this litigation which had then already consumed more than three years. During the additional year and a half that has now elapsed since the previous denial, widespread reliance has been placed upon the decision of the Court of Appeals, by the Secretary of Labor (who has made similar industry-wide wage determinations for about 40 other industries since the denial of the earlier petitions, 21 F.R. 5444, 6750, 3315; 22 F.R. 3011), by the lower courts in other cases (see the decisions cited *supra*, p. 7), and by employers and employees and government agencies subject to wage determinations made for other industries. Indeed,

wage settlements have been made on the basis of that decision by many of the litigants who were parties to the previously denied petitions, the companion *Covington Mills* case and the *Allendale* case having been thus settled without further court proceedings.

Since no intervening conflict with the decision has developed, either judicially or by legislative action, and there have been no other circumstances contravening that ruling, the soundness of the decision below, in adhering to the long-standing administrative interpretation, is even less open to question now. And, plainly, a prompt end to this relitigation is increasingly important to the public interests involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 45964 - 22